

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**YOUNGSTOWN TELEVISION AND  
RADIO, L.L.C. d/b/a WKBN-TV AND  
WYFX - TV<sup>1</sup>**

**Employer**

**and**

**Case No. 8-RC-16291**

**NATIONAL ASSOCIATION OF  
BROADCASTING EMPLOYEES AND  
TECHNICIANS, CWA, AFL-CIO**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

*All full time and regular part-time producers employed at the Employer's Youngstown, Ohio facility but excluding all other employees, office clericals, guards and supervisors as defined in the Act.*

Approximately 5 employees are in the unit found to be appropriate.

The Employer, Youngstown Television and Radio, L.L.C., d/b/a WKBN – TV and WYFX – TV (hereinafter "Youngstown Television" or the "Employer"), is a Delaware corporation which operates 2 television stations at its facility located at 3930 Sunset Boulevard, Youngstown, Ohio

The sole issue presented at the hearing was whether the Employer's producers are statutory supervisors under the Act. The Petitioner contends the producers are not statutory supervisors and constitute an appropriate unit while the Employer maintains the producers are supervisors and, therefore, the petition should be dismissed.

At the hearing, one witness, Nick Matesi, the Employer's director of news operations, testified for the Employer. The Petitioner also called one witness, producer Lindsay Berger. At the conclusion of the hearing both parties made closing arguments but waived their right to file briefs in support of their positions.

The vice president and general manager of Youngstown Television is Roland Adeszko. Other managers at the station include Nick Matesi, director of news operations; Erin Ascinoe, executive producer; Tina Craten, managing editor; and Gary Corson, chief photographer.

Employees working at the stations include the five full time and part-time producers in issue here, 11 photographers, and an undetermined number of directors, reporters and anchor people. The directors, reporters and photographers are covered by existing collective bargaining agreements.

The news director oversees the entire news department at the stations and is responsible for the budget, setting strategic goals, and achieving rating goals. He is also responsible for hiring and discharging employees, with approval from the general manager.

The executive producer is subordinate to the news director. His responsibilities include overseeing the producers. The executive producer provides input and feedback to producers with respect to the production of on-air programs. For example, the executive producer consults with producers as to the manner in which they handle “rundowns”. The “rundown” is described in the record as a written blueprint for a broadcast. In this connection, the executive producer advises the producers of placement and length of stories.

The managing editor is responsible for the assignment desk and schedules reporters and producers, establishes the initial template of the news stories to be covered in a given day and makes the initial assignments for reporters and photographers covering stories.

The record describes the producers as the newscast. In this regard, producers write the lineup of the stories to air and compile the rundown. The record establishes that the process of preparing a newscast is a collaborate effort of many employees, including the producers.

The producers have no authority to hire or discharge employees and generally are not involved in the interview process. They receive compensation on an hourly basis and make between \$9.00 to \$20.00 an hour. They are required to fill out time cards to receive their pay.

The highest paid producer earns \$26,000 a year. The producers do not have their own offices but sit at a desk in the newsroom with a computer and a cubicle.

Producers cannot grant pay increases or bonuses nor can they issue discipline. News Director Matesi stated that he has not told other employees that the producers are supervisors. Producer Berger indicated that she had never been told that she was a supervisor.

According to Matesi, managing editor Tina Craten runs the assignment desk when she is at the station. Craten works between 8:00 a.m. to 4:00 p.m., Monday through Friday. It is her responsibility to have a calendar of the news of the day, keeping track of stories and initially assigning reporters and photographers to each story. At some point the producers get involved in the process and have input into what the reporters and photographers will cover. The producers fill in on the assignment desk when the managing editor is not available, particularly on weekends and overnight periods. On some occasions the producers may also set assignments of the employees in the newsroom. However, Matesi noted only one example where on a weekend a producer changed a reporter's assignment.

As noted above, the Petitioner argues that the producers employed by the Employer are employees under the Act and constitute an appropriate unit. The Employer contends that these five individuals are supervisors and therefore the petition should be dismissed.

Section 2(11) of the Act defines a supervisor as follows:

"any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment."

The Board has consistently found that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status on the employee, provided that the authority is exercised with independent judgment and not in a routine matter. **Pepsi-Cola Company**, 327 NLRB No. 183 (1999); **Providence Hospital**, 320 NLRB 717 (1996); and **Bowne of Houston, Inc.**, 280 NLRB 1222, 1223 (1986). It is also well established that the burden of proving supervisory status rests on the party asserting such status. **NLRB v. Kentucky River Community Care, Inc.**, 532 U.S. 706, 721, 121 S. Ct. 1861 (2001), **Billows Electrical Supply of Northfield, Inc.**, 311 NLRB 878 (1993) and **The Ohio Masonic Home, Inc.**, 295 NLRB 390 (1989).

In support of its position that the producers are supervisors within the meaning of the Act, the Employer relies upon the Board's ruling in **Hearst Broadcasting Corporation**, 267 NLRB 326 (1983). In **Hearst** the Board found that producers employed by a television station were supervisors under the Act. In so finding, the Board noted that news producers were considered by employees to be supervisors and were told by management that they were supervisors. The producers, in their discretion, could change work assignments made by the assignment editors. The Board found that the news producers were more than a part of an integrated team. They were required to talk to employees with work problems and submit written reports which could result in discipline.

In contrast to **Hearst** the Board has held on numerous occasions that news producers are not supervisors within the meaning of the Act. In **Westinghouse Broadcasting Company, Inc.**, 215 NLRB 123 (1974), the Board noted that much confusion regarding the alleged supervisory authority of producer/directors stems from the natural implications of their job titles. The presumption that a producer/director directs others is unavoidable. Such direction, however,

may not amount to responsible direction within the meaning of Section 2(11). **Id. at 125.** In **Westinghouse**, the Board concluded that the producer/directors did not function as supervisors but rather as part of an integrated production team, each member of which was independently capable of executing his assignment.

The Board has consistently followed the principles enumerated in **Westinghouse**, *supra*. Recently, in **King Broadcasting Company**, 329 NLRB 378 (1999) and **McGraw Hill Broadcasting Company, Inc.**, 329 NLRB 454 (1999) the Board concluded that producers were not supervisors. Specifically, it noted that such individuals in the broadcast industry were not supervisors where they were part of an integrated production team in which their skills and responsibilities were joined in a collaborative effort with those of other news department employees in order to coordinate and develop a single product. **King Broadcasting at 381.**

More recently in **Multimedia KSDK, Inc.**, \_\_\_ F.3d \_\_\_, 2001 WL 1426538 (8th Cir. November 15, 2001) *enfg.* 330 NLRB No. 114 (2000), the court agreed with the Board's finding that the producers in issue were not supervisors. The court relied on the Board decisions in **McGraw-Hill**, *supra*, and **King**, *supra*, finding that the producers engaged in a largely collaborative enterprise and did not exercise independent judgment of the type envisaged in the Act. The court also considered the issue in light of the Supreme Court's teachings in **NLRB v. Kentucky River Community Care, Inc.**, 532 U.S. 706, 121 S. Ct. 1861 (2001) and concluded that the Board has separately enunciated the "collaboration theory" as an independent basis for denying producers supervisory status and there was no question but that **Kentucky River** left that theory unscathed. **Multimedia KSDK, Inc.**, 2001 WL 1426538 at *sl. op.* p. 6.

In **NLRB v. Kentucky River Community Care, Inc.**, 532 U.S. 706, 121 S. Ct. 1861 (2001), the Court was presented with the issue of whether registered nurses and rehabilitation

assistants were considered supervisors under the Act. It considered the matter of whether the employees in issue used independent judgment when they exercised ordinary professional or technical judgment in directing less-skilled employees to deliver services. It concluded that for purposes of establishing supervisory status it was improper to exclude consideration of the employees' use of professional judgment when evaluating whether they used independent judgment in the performance of their duties.

Applying these principles to the instant case, I conclude that the five producers in issue are not supervisors as defined in the Act. As noted by the Board in Billows, supra, and Ohio Masonic Home, supra, and recently reaffirmed by the Supreme Court in Kentucky River, supra, the burden of proving supervisory status rests on the party asserting such status. In this case has failed to meet its burden.

The Act provides that to be considered a supervisor an individual must have authority to perform or effectively recommend any one of eleven functions noted in Section 2(11). In exercising this authority the incumbent's actions must be more than merely routine or clerical in nature and must require the use of independent judgment. Board law establishes that when evaluating whether producers in the broadcast industry fall under the definition of supervisor careful consideration is given to the specific facts of each case including whether the employees were engaged in a largely collaborative enterprise.

It is clear from the testimony of news director Matesi that the production of its broadcasts is a "collaborative effort" of all of those involved. His testimony demonstrates the close interaction of all of the managers and employees when preparing for and broadcasting news stories at a station that operates 24 hours a day, seven days a week. From the preparation and review of rundowns, the selection of stories to be aired, the reporters and photographers

assigned to each story, and the actual on-air presentation of the material, it is evident that the whole process is the combined and integrated work of many managers and employees. On no fewer than three occasions Matesi specifically referred to the collaborative effort and/or meetings needed and held between the staff members to achieve the finished product of a broadcast.

It is in the context of this collaborative effort that the specific duties of the producers must be considered. The record establishes that producers have no authority in any manner to hire, discharge, transfer, layoff or recall employees or to effectively recommend such actions. Matesi was unable to recall any instance where a producer participated in an employment interview. Employee Berger confirmed that she cannot hire employees and has never participated in an interview. Furthermore, there is no evidence that producers have any authority to transfer, layoff or recall employees at the stations.

Producers at the stations do not have authority to discipline, suspend, adjust grievances, promote or reward employees or to effectively recommend such actions. When asked on direct examination, Matesi confirmed that producers have no authority to grant pay increases, provide bonuses, impose formal discipline, place letters in employees' files or suspend them. He indicated that he could issue disciplinary letters with the approval of the general manager. The general manager also has authority to issue pay raises and bonuses.

Berger stated that she had no authority to formally discipline anyone. If anything her actions were limited to telling employees to be quiet or tell the on-air anchor or reporters that they were out of time for their segment during a broadcast. Berger stated that she was just told the week of the hearing that if employees were advised that their on-air presentations were running long and they persisted in the action, she should advise the news director.



As to the producers' authority to assign or direct other employees, it is apparent that their actions in this regard do not rise to the level of statutory supervisors. Matesi testified that the producers are responsible to oversee the newscasts from start to finish. In this regard they compile the rundowns, determine which stories will air, the order of the stories and their length. In order to complete these responsibilities it is important that they successfully interact with other employees as part of this collaborative effort. Their authority to assign or direct other employees is limited and relatively insignificant. As Berger noted she can tell employees to be quiet and can tell on-air employees that they are running long and should limit their presentation.

The responsibility at the station to assign and direct the workforce rests squarely in the hands of the managerial staff. The producers may on some occasions request that reporters or photographers work on different assignments but the ultimate authority rests with management. In this regard, Matesi admitted that the managing editor runs the assignment desk and as such has responsibility for several matters including: making sure that the station has a calendar of the news of the day; keeping track of stories; and making the initial job assignments to reporters and photographers. The managing editor prepares the employee work assignments and issues a schedule each week for the reporters. The chief photographer prepares a schedule for the photographers on his staff.

The managing editor works from 8:00 a.m. to 4:00 p.m. five days a week. When she is not available the producers take up the responsibilities of the assignment desk. There is no evidence to suggest, however, that the producers can vary the overall work schedule prepared by the managing editor. As the need arises, for example, during overnight and weekend periods, the producers can direct that reporters and photographers cover breaking news stories or change assignments but these duties cannot be considered supervisory in nature. The work assignments

and direction of employees at the station is clearly the responsibility of the management staff and managing editor. The producers are responsible for putting together a news broadcast and they retain only creative authority. Any assignments or direction they perform are aimed at that goal. They are employees charged to perform a given task, i.e., oversee the production of a broadcast and are an integrated part of a collaborative effort. The limited authority they have been given is not of the kind or nature to elevate them to supervisory status. The Supreme Court in **Kentucky River**, **supra**, intimated that individuals who merely direct the performance of discrete tasks rather than directing other employees have not engaged in responsible direction so as to confer supervisory status. **121 S. Ct. at 1871.**

The producers do not possess any of the secondary indicia of supervisory status. They are not provided with assigned offices but rather work on the floor in the television studio at a desk surrounded by a cubicle. The producers are paid on an hourly basis and must complete time cards. Their rate of pay is rather low with a range of \$9.00 to \$20.00 an hour. The highest paid producer only earns \$26,000 a year. They attend weekly meetings with other non-supervisory staff, including producers, anchors and reporters to discuss upcoming events. Matesi admitted that he never had meetings with department employees to tell them that the producers were supervisors. Berger indicated that she was just told the week before the hearing, by Matessi that she was considered a supervisor.

Having considered all of the record evidence, I conclude that the producers are not supervisors as defined in the Act. While producers execute certain functions and exercise a certain amount of creative latitude in carrying out their duties, they work as part of a collaborative process to produce a finished news broadcast. Accordingly, I find that they are

statutory employees as they do not exercise independent judgment in the manner required by the Act to establish supervisory authority. See **Multimedia KSDK**, *supra* at sl. op. pgs. 5-6.

As noted above, the Employer opposed the petitioned-for unit only on the basis that the producers were supervisors and not because the unit was otherwise inappropriate. It is well established that the Act requires only that a petitioner seek an appropriate unit, and not the most appropriate or comprehensive unit. See, **Morand Brothers Beverage Co.**, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7<sup>th</sup> Cir. 1950) and **Capital Bakers**, 168 NLRB 904 (1967). In deciding an appropriate unit, the Board first considers the union's petition and whether the unit sought is appropriate. **Overnite Transportation Company**, 322 NLRB 723 (1966). A petitioner's desire concerning the composition of the unit which it seeks to represent constitutes a relevant consideration. **Marks Oxygen Company of Alabama**, 147 NLRB 228 (1964). I note that the Board has found a unit of television producer/directors to be an appropriate unit. **WTMJ**, 222 NLRB 1111, 1112 (1976). Accordingly, I find the petitioned-for unit in the instant case to be an appropriate unit.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the

United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **NATIONAL ASSOCIATION Offp**

**BROADCAST EMPLOYEES AND TECHNICIANS, CWA, AFL-CIO.**

**LIST OF VOTERS**

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by December 19, 2001.

Dated at Cleveland, Ohio this 5th day of December 2001.

/s/ Frederick J. Calatrello

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Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8

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